Supreme Court, U.S.
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In the Supreme Court of the United States

NEW CINGULAR WIRELESS SERVICES, INC.,
F/K/A AT&T WIRELESS SERVICES, INC., AND
NEW CINGULAR WIRELESS PCS, LLC,

Petitioners,

v.

PORSHA MEOLI, LESLIE ARMSTRONG, SRIDHAR KRISHNAN,
WENDY LOWINGER, JERILYN MARLOWE,
ALAN CHERRIGAN, AND JAEL SALAS,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Five

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the same questions that are presented in *Cingular Wireless LLC v. Mendoza*, No. 05-1119. They are:

1. Whether the Federal Arbitration Act preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant's amenability to class arbitration.

2. Whether the Federal Arbitration Act preempts a state-law rule that claims seeking injunctions on behalf of the general public are non-arbitrable.

RULE 14.1(b) STATEMENT

In addition to the parties listed in the caption, Diane Tucker was a party to the proceedings in the Court of Appeal. Although she is not now and never has been a customer of AT&T Wireless Services, Inc., Tucker filed a complaint against AT&T Wireless seeking relief on behalf of AT&T Wireless customers. AT&T Wireless moved to compel her to arbitrate on the ground that the customers whom she purports to represent are subject to binding arbitration provisions. The Court of Appeal held that she is not required to arbitrate because she never personally entered into an arbitration agreement with AT&T Wireless. AT&T Wireless has elected not to seek review of that decision, and accordingly Tucker is not a party to this petition.

AT&T Wireless Services PCS, LLC; Bay Area Cellular Telephone Company; and Cellular Telephone Company were all named as co-defendants below in the various complaints, and were appellants in the Court of Appeal. Bay Area Cellular Telephone Company is a terminated California general partnership to which petitioner New Cingular Wireless PCS, LLC is a successor. AT&T Wireless Services PCS, LLC merged into AT&T Wireless PCS, LLC, which is now known as New Cingular Wireless PCS, LLC. Cellular Telephone Company is a terminated New York general partnership.

CORPORATE DISCLOSURE STATEMENT

Petitioners New Cingular Wireless Services, Inc. (formerly known as AT&T Wireless Services, Inc.) and New Cingular Wireless PCS, LLC are wholly owned by Cingular Wireless LLC or its wholly-owned subsidiaries. Cingular Wireless LLC has no parent company. It is indirectly owned by AT&T Inc. (the result of the acquisition of AT&T Corp. by SBC Communications, Inc.) and BellSouth Corporation, which are the only publicly held corporations with a 10% or more ownership interest in Cingular Wireless LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners New Cingular Wireless Services, Inc. (formerly known as AT&T Wireless Services, Inc.) and New Cingular Wireless PCS, LLC respectfully petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California.[1]

OPINIONS BELOW

The Court of Appeal's opinion after transfer (App., *infra*, 1a-14a) is unreported. The order of the California Supreme Court denying review (App., *infra*, 15a) is unreported. The order of the Superior Court denying AT&T Wireless's motion to compel arbitration (App., *infra*, 16a-28a) is unreported. The original decision of the Court of Appeal affirming in part and reversing in part the Superior Court's order (App., *infra*, 29a-50a) is unreported. The order of the California Supreme Court granting review of the Court of Appeal's original decision and instructing the Court of Appeal to reconsider its decision (App., *infra*, 51a-52a) is unreported.

JURISDICTION

The judgment of the Court of Appeal was entered on September 30, 2005. The California Supreme Court denied AT&T Wireless's timely filed petition for review on December 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Although the Court of Appeal's judgment affirming the denial of AT&T Wireless's motion to compel arbitration is interlocutory, this Court has jurisdiction to review such judgments. See, *e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987); see also *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (granting certiorari and reversing interlocutory ruling refusing to enforce arbitration provision without address-

[1] We will refer to petitioners collectively as AT&T Wireless.

ing jurisdiction); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (same); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 (the Supremacy Clause) of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

STATEMENT

Petitioner AT&T Wireless is now part of Cingular Wireless LLC, which is the nation's largest wireless service provider, with over 50 million customers, several million of whom are California residents. When AT&T Wireless's customers obtained wireless service, they entered into standard wireless service agreements that contained arbitration provisions.

Notwithstanding their agreements to arbitrate, respondents collectively filed four class and representative actions against AT&T Wireless, asserting claims for restitution and injunctive relief pursuant to California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*),

California Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 *et seq.*), and California Civil Code Section 1671. All of these lawsuits, which are among several coordinated actions now pending in the Alameda County Superior Court, challenge the termination-fee provisions of AT&T Wireless's subscriber agreements. In addition, several of the respondents attack AT&T Wireless's alleged practice of programming its handsets so that they would work only on AT&T Wireless's network. App., *infra*, 2a, 4a.

AT&T Wireless moved to stay proceedings and compel arbitration of respondents' claims on the ground that respondents are bound by arbitration provisions contained in their agreements with AT&T Wireless. The Alameda County Superior Court nonetheless denied the motion to compel arbitration, holding that under controlling California precedent AT&T Wireless's arbitration provision is unconscionable because it prohibits class and representative actions. App., *infra*, 22a-28a. The court also concluded that respondents' claims for public injunctive relief under the CLRA and UCL are non-arbitrable under, respectively, *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999) (CLRA), and *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003) (UCL). App., *infra*, 16a-21a. See also 05-1119 Pet. at 4-5.

The Court of Appeal reversed in part and affirmed in part, holding that the prohibition of class arbitration is not unconscionable, but that respondents' claims for public injunctive relief are non-arbitrable. App., *infra*, 33a, 37a-50a. Both sides petitioned for review. The California Supreme Court then granted review and transferred the case back to the Court of Appeal with instructions to vacate its opinion and reconsider in light of *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). App., *infra*, 51a.

In *Discover Bank*, the California Supreme Court held that class-action waivers are substantively unconscionable "when the waiver is found in a consumer contract of adhesion in a

setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. As set forth more fully in our petition for certiorari in *Mendoza*, the court also rejected several arguments raised by Discover Bank and its amici that the FAA preempted its unconscionability holding. See 05-1119 Pet. at 5-6.

After receiving supplemental briefs, the Court of Appeal filed a new opinion on September 30, 2005. As in its initial opinion, the court held that, under *Broughton* and *Cruz*, respondents' claims for public injunctive relief are non-arbitrable. App., *infra*, 4a-5a. Over AT&T Wireless's preemption arguments, the court then proceeded to hold that, under *Discover Bank*, the prohibition against class arbitration in AT&T Wireless's arbitration provision is substantively unconscionable because (i) it is found in a contract of adhesion, (ii) respondents' claims are small, and (iii) respondents allege that AT&T Wireless engaged in unlawful practices. *Id.* at 9a-14a.

AT&T Wireless filed a petition for review in the California Supreme Court arguing that (i) the Court of Appeal had misconstrued *Discover Bank*; (ii) the FAA preempts the Court of Appeal's holding that AT&T Wireless's prohibition against class arbitration is unconscionable; and (iii) *Broughton* and *Cruz* cannot be squared with this Court's precedents and should be overruled. The California Supreme Court denied review on December 14, 2005, without comment. App., *infra*, 15a.

REASONS FOR GRANTING THE PETITION

The issues presented in this case are identical to the ones presented in *Cingular Wireless LLC v. Mendoza*, No. 05-1119. First, the petition raises the question left open by this Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984): whether the FAA preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant's amenability to class arbitration. Second, the petition presents the question whether the FAA preempts a state-law rule that claims for injunctions that would benefit the general public are non-arbitrable.

Both of these questions were answered in the negative by the courts of California. Together, these two holdings threaten to be the death knell for tens of millions of arbitration agreements in California.

In our petition for a writ of certiorari in *Mendoza*, we submit that (1) there is a conflict between the courts of California and other state and federal courts on each of the questions presented; (2) the issues presented are of great importance and warrant this Court's review; and (3) the California courts are on the wrong side of each issue.[2] Those arguments apply with equal force here.

Because the issues presented in this case are the same as those presented in *Mendoza*, the outcome of *Mendoza* should determine the outcome here. Accordingly, it would be appropriate for the Court to hold this case pending the disposition of the petition for a writ of certiorari in *Mendoza*.

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[2] We are supplying respondents' counsel with a copy of our petition in *Mendoza*.

CONCLUSION

The petition for a writ of certiorari should be held for disposition in light of *Cingular Wireless LLC v. Mendoza*, No. 05-1119.

Respectfully submitted.

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Court of Appeal,
First District, Division 5, California

PORSHA MEOLI, ET AL.,
Plaintiffs and Respondents,

v.

AT&T WIRELESS SERVICES, INC., ET AL.,
Defendants and Appellants.

Nos. A106061, A106340, A106341.

(Alameda County Super. Ct. –
No. JCCP 4332)

Sept. 30, 2005

Alan Roth Plutzik, Bramson, Plutzik, et al., Walnut Creek, CA, Reed Kathrein, Lerach Coughlin Stoia Geller Rudman & Robbins, San Francisco, CA, John David Franklin, Franklin & Franklin, William S. Lerach, San Diego, CA, for Plaintiffs-Respondents.

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JONES, P.J.

The Supreme Court has remanded this matter to us for reconsideration in light of its recent decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*). Upon reconsideration, we conclude that the arbitration clause at issue here prohibiting class-wide arbitration is unconscionable and unenforceable. We affirm the trial court's order denying the petition to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

Three separate lawsuits were initially brought against defendant AT&T Wireless Services (AT&T) and other providers of wireless telephone service, challenging the "early termination fee" charged to customers who end their wireless telephone service before the expiration of the term of the service agreement.

First, Porsha Meoli and two other named plaintiffs brought a class action in Alameda County to challenge both the early termination fee and AT&T's locked handsets that preclude the use of competitors' networks. Plaintiffs alleged that the early termination fee constituted an unlawful liquidated damages provision and thereby violated the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et seq.) and the Consumers' Legal Remedies Act (CLRA) (Civ.Code, § 1750 et seq.). Second, Diane Tucker sued in Orange County under similar theories as a private attorney general under the UCL. And, in the third lawsuit, Jerilyn Marlowe and seven other named plaintiffs brought a class action in Alameda County alleging violations of the UCL and the CLRA. These three lawsuits were coordinated with other lawsuits pending against other wireless service providers.

Customers who purchase a mobile telephone for use on the AT&T wireless system are subject to the terms and conditions of a wireless service agreement that comes with the phone. The customer has 30 days in which to review the terms and to cancel the agreement. Over the years, the exact language of the wireless service agreement has been altered, and there are three variations at issue in the lawsuits here.[1]

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[1] In 2001 and 2002, AT&T customers received a "welcome guide" with the telephone that contained the terms and conditions of the wireless service. The plaintiffs in the Meoli lawsuit received a welcome guide. Beginning in 2003, customers received a wire-

All three versions contain an arbitration clause calling for the arbitration of all disputes arising out of the wireless service agreement. All three versions provide that the arbitration is to be governed by the wireless industry arbitration rules of the American Arbitration Association. Moreover, under all three versions the customer retains the right to bring an action in small claims court notwithstanding the agreement to arbitrate all disputes.

The arbitration clause allows only individual claims to be heard in arbitration. The early versions of the wireless service agreement provided that the arbitrator could not award relief on a class-wide or representative basis. The later version is even more explicit: "[A]ny arbitration will be conducted on an individual basis and not on a consolidated, class-wide, or representative basis."

The latest version of the arbitration agreement sets up a three-tiered system for allocation of costs. If the customer's claim is for less than $1,000, the customer must pay a fee of $25, and AT&T will pay the balance of administrative fees and costs. If the customer's claim is between $1,000 and $75,000, then the customer must share in the costs of arbitration, but need pay no more than the equivalent court filing fee. And, if the claim is in excess of $75,000, then all administrative costs and expenses will be divided equally. The earlier versions had only a two-tiered system: $25 fee for claims under $1,000 and equal division of costs for claims above $1,000.

AT&T initially petitioned to compel arbitration in the Meoli lawsuit and, after the Marlowe and Tucker lawsuits were filed, petitioned in those cases as well. AT&T further requested that any arbitration conducted be limited to arbitra-

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less service agreement. The plaintiffs in the Marlowe lawsuit received a wireless service agreement.

tion of individual claims. Plaintiffs opposed the petition, arguing that the arbitration clause was unconscionable in various particulars, including the ban on class-wide relief. The trial court rejected plaintiffs' other arguments on the unconscionability of the arbitration clause, but the trial court agreed that the ban on class-wide arbitration is unconscionable and invalid under the Court of Appeal decision in *Szetela, supra,* 97 Cal.App.4th 1094. The court denied AT&T's petition to compel arbitration. By way of dictum, the court noted that because the arbitration clause is not otherwise unconscionable, if *Szetela* were not to be followed, arbitration would be compelled on an individual basis and not as a class or representative claim. AT&T filed its notice of appeal from the order denying arbitration.

Meanwhile, two additional lawsuits were filed against AT&T challenging the early termination fee—one by Alan Cherrigan on behalf of himself and the general public under the UCL and the second by Jael Salas. Those two lawsuits were added to the coordination proceeding, and by stipulation the order denying arbitration was applied to them. AT&T then filed notices of appeal on those cases. We consolidated the appeals pursuant to stipulation. Plaintiffs in the Meoli lawsuit as well as plaintiff Tucker have filed a protective cross-appeal to challenge the trial court's rejection of plaintiffs' other claims of unconscionability of the arbitration clause.

DISCUSSION

I. Injunctive Relief

All the plaintiffs seek, in addition to monetary recovery of the early termination fees, injunctive relief to benefit the general public. However, the California Supreme Court has held that such claims for injunctive relief are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316 [UCL]; *Broughton v. Cigna Healthplans*

(1999) 21 Cal.4th 1066, 1079-1082 [CLRA].) AT&T acknowledged below that the claims for injunctive relief were not arbitrable under *Cruz* and *Broughton,* and on appeal AT&T again recognizes that this court is bound to follow existing precedent from the California Supreme Court. The trial court correctly denied AT&T's petition to compel arbitration of the claims for injunctive relief.

II. Monetary Claims

A. Nonsignatory Tucker

With one exception, the plaintiffs subject to AT&T's petition to compel arbitration are parties to the arbitration clause in AT&T's wireless service agreement. The one exception is plaintiff Diane Tucker, who is not and never has been a subscriber to AT&T's wireless service. She brought suit against AT&T solely as a private attorney general under the UCL for the benefit of the general public.[2]

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[2] At the time of the proceedings below, section 17204 of the Business and Professions Code provided in relevant part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or any [authorized] county counsel . . . or any [qualified] city attorney . . . or by *any person acting for the interests of* itself, its members or *the general public.*" (Bus. & Prof.Code, § 17204, italics added.)

While this appeal was pending, on November 2, 2004, the electorate amended the UCL by Proposition 64 to delete the provision for a private attorney general. (2004 West's Cal. Legis. Service, Prop. 64.) We find it unnecessary to examine the effect of Proposition 64 upon the present appeal.

Whether Diane Tucker is entitled to pursue her claims under the UCL is not an issue that is cognizable on AT&T's petition to compel arbitration. AT&T's assertions that Diane Tucker now

Plaintiff Tucker was before us in another appeal on a lawsuit brought in San Mateo County against a different wireless telephone service provider. (*Tucker v. Cingular Wireless*, A106671 [challenging rates], review denied 9/7/05.) We apply the same reasoning here as in that related appeal and conclude that plaintiff Tucker cannot be compelled to arbitrate.

By statute, an order compelling arbitration is warranted when "an agreement to arbitrate the controversy exists" and "a party thereto refuses to arbitrate such controversy." (Code Civ. Proc., § 1281.2.) The fundamental assumption of arbitration is that the parties have consented to resolving their disputes outside the judicial process. The strong policy favoring arbitration as a means of resolving disputes does not extend to persons who are not parties to the arbitration agreement and have not elected to submit to arbitration. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245; accord *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990.) A proceeding to compel arbitration is essentially a suit in equity for specific performance of an arbitration agreement. A court in equity has no power to compel third party nonsignatories to arbitrate absent some implied authority by the signatory to bind the nonsignatory. (47 Cal.App.4th at pp. 242-245; see also *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89.)[3]

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lacks standing and that her claims should be entirely dismissed may be raised in the trial court by an appropriate motion.

[3] A nonsignatory third party may invoke an arbitration clause against a signatory based upon equitable estoppel. (E.g., *Alliance Title Co., Inc. v. Boucher* (2005) 127 Cal.App.4th 262; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705.)

As discussed at length in *County of Contra Costa v. Kaiser Foundation Health Plans, Inc., supra*, 47 Cal.App.4th at pages 242-245, a nonsignatory has been held bound by an arbitration agreement in limited cases involving a preexisting relationship between the nonsignatory and a party to the agreement.[4] (E.g., *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702, 704, 709 [insured employee bound by arbitration clause in medical services contract entered into by employer]; *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1511 [wife bound by arbitration clause in husband's physician-patient agreement]; *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222 [general partner of the signatory limited partnership bound by arbitration clause in construction agreement].) Here, no preexisting relationship exists between plaintiff Tucker and the wireless telephone subscribers she purports to represent; there is no basis for finding that the wireless subscribers had authority to bind plaintiff Tucker to the arbitration agreement.

Net2Phone, Inc. v. Superior Court (2003) 109 Cal.App.4th 583, upon which Cingular relies, is not on point. The question in that case was whether a forum selection clause could be enforced against a plaintiff who was not a party to the telephone service contract but who brought the action as a private attorney general under the UCL. We draw a distinction between a forum selection clause and an arbitration clause. A forum selection clause may be enforced

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[4] Another theory for binding a nonsignatory is the doctrine of incorporation by reference. (E.g., *Slaught v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 748-749 [arbitration clause in construction contract between property owner and general contractor incorporated into subcontracts]; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271-1274 [arbitration clause in construction agreement incorporated into surety bond].)

against a nonparty who is "closely related to the contractual relationship." (*Id.* at pp. 587, 588; *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1493.) Enforcement of an arbitration clause, in contrast, requires more than the nonparty's connection to the contract. (E.g., *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 143 [father's arbitration agreement with medical providers did not bind his adult daughters on their wrongful death claims]; *Benasra v. Marciano, supra*, 92 Cal.App.4th at p. 990 [arbitration agreement signed by corporation's president not binding on the individual in his claim for libel]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1229 [arbitration clause in contract between designer and third party not binding on property owner].)

Our Supreme Court has left unresolved the question whether a plaintiff seeking restitution as a private attorney general under the UCL can be compelled to arbitrate when the plaintiff is not a party to the arbitration agreement but is acting on behalf of injured consumers who are parties to the arbitration agreement. (*Cruz v. PacifiCare Health Systems, Inc., supra*, 30 Cal.4th at p. 320, fn. 7.) We observe that the question has little practical significance, because the same factors that preclude a private attorney general from being compelled to arbitrate also serve to limit the plaintiff's relief in court. While civil penalties may be assessed when the action is initiated by a governmental prosecutor (Bus. & Prof.Code, § 17206), monetary damages are not recoverable under the UCL. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) A private plaintiff is limited to injunctive relief or restitution, i.e., the return of money obtained through an unfair business practice (Bus. & Prof.Code, § 17203). And restitution requires an ownership or vested interest in the money; nonrestitutionary disgorgement of profits is not available to an individual acting as a private attorney general under the UCL. (*Korea Supply Co. v. Lock-*

heed Martin Corp. (2003) 29 Cal.4th 1134, 1149-1152.) As the Supreme Court explained, "The breadth of standing under this act allows any consumer to combat unfair competition by seeking an injunction against unfair business practices. *Actual direct victims of unfair competition may obtain restitution* as well." (*Id.* at p. 1152; italics added.) In the present case, plaintiff Tucker is not an actual direct victim of AT&T's early termination fee and is acting only as a private attorney general. She has no monetary remedies under the UCL, even assuming arguendo that her claims remain viable. (See fn. 5, *ante*.) At most, her remedy is injunctive relief, and, as we have said, the claims for injunctive relief are not arbitrable.

B. The Ban on Class Arbitration

(1) Unconsionability

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)[5] Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ.Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 972.)

The determination of unconscionability is a question of law for the court. (Civ.Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine un-

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[5] The statutory reference to grounds for *revocation* of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to *rescind* the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.)

conscionability. (93 Cal.App.4th at p. 851; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The *procedural* element focuses on the way in which the disputed provision was presented – i.e., whether there was "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The *substantive* element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz v. Foundation Health Psychcare Services, Inc* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.)[6]

We agree with the trial court's conclusion that the arbitration agreement, included in the box along with the telephone, was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc., supra,* 93 Cal.App.4th at p. 853; *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at pp. 1533-1534.) The more difficult question is whether the ban on class arbitration is substan-

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[6] To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a "sliding scale" or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz, supra,* 24 Cal.4th at p. 114; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1056.)

tively unconscionable. That question was recently examined by our Supreme Court in *Discover Bank*, where the court focused on the exemption that a contract clause banning class action or class arbitration relief may provide to an offending business from liability for its bad business practices. The court said: "[C]lass action waivers found in [adhesive] contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy. As stated in Civil Code section 1668: 'All contracts *which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury* to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.' (Italics added.)" (*Discover Bank, supra*, 36 Cal.4th at p. 161.)

While recognizing that class action and class arbitration waivers are not, in the abstract, exculpatory clauses, the court commented that such clauses are "indisputably one-sided." (*Discover Bank, supra*, 36 Cal.4th at p. 161.) The court expressly rejected the notion that provisions in the arbitration agreement allowing litigation in small claims court or recovery of attorney fees by the prevailing party are adequate substitutes for the important mechanism of class-wide arbitration. (*Id.* at p. 162.)[7]

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[7] AT&T argues in its supplemental briefing that plaintiffs here, unlike the plaintiff in *Discover Bank*, do not have any economic disincentive to bring individual arbitration of their claims. AT&T argues that its obligation under the arbitration agreement to pay the costs of arbitration upfront (except for $25) puts this case on a different plane and provides a basis for distinguishing *Discover Bank*. Cingular [sic] asserts that because it must pay the costs of arbitration, it is AT&T, not the consumers, who have the economic disincentive. It is AT&T who will be motivated to pay a claim rather than let it go to arbitration.

The Supreme Court concluded as follows: "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Discover Bank*, *supra*, 36 Cal.4th at pp. 162-163.)

In the present case, the class arbitration ban appears in consumer contracts for wireless telephone service, a setting expected to involve small amounts of damages. Indeed, the early termination fee charged by AT&T is alleged to be $175 or $200. The issue we face is whether the complaints here allege "*a scheme to deliberately cheat* large numbers of consumers out of individually small sums of money." We construe the Supreme Court's word "cheat" in light of Civil

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AT&T's argument erroneously presupposes that the only disincentive for individual consumers to redress dubious business practices is economic. The Supreme Court has indicated otherwise – that the problem is also a question of time and trouble: Quoting from a United States Supreme Court case, the court in *Discover Bank* explained: "[S]mall recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (36 Cal.4th at p. 157.)

Code section 1668, which prohibits clauses that exempt the contracting party from liability for *fraud or willful injury*.

Here, the complaints in all five consolidated cases allege that the termination fees constitute unlawful liquidated damages.[8] We have already concluded that the complaint by Diane Tucker is not subject to arbitration; our review is limited to the remaining four complaints. Three of the complaints (by Marlowe, Cherrigan, and Salas) add allegations that the early termination fees are *intended* to lock in subscribers and prevent them from switching carriers, thereby generating enormous profits for the carriers. The complaint of the Meoli plaintiffs additionally alleges that AT&T committed fraud in requiring locked headsets that preclude subscribers from switching carriers. Pursuant to the rule of *Discover Bank*, we conclude that the class arbitration ban effectively operates to exculpate AT&T from responsibility for its own willful injury to a large class of consumers, and the class arbitration ban is thereby unconscionable.

It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ.Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075.) Here, AT&T argued below and continues to assert that the provision is an integral part of the arbitration agreement and cannot be severed.

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[8] Those allegations alone do not amount to allegations of fraud or willful injury, but they do allege a violation of section 1671 of the Civil Code. We note that the policy against exculpatory clauses extends not just to exculpation from fraud or willful injury but also to exculpation from "violation of law." (Civ.Code, § 1668.)

Hence, we are compelled to conclude that the arbitration agreement cannot be enforced.[9]

DISPOSITION

The order denying the petition to compel arbitration is affirmed. Costs are awarded to respondents.

We concur: STEVENS and SIMONS, JJ.

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[9] In light of our conclusion, we need not examine the separate issue whether the contractual ban on class arbitration constitutes an invalid waiver of the statutory right to class-wide relief under the CLRA (Civ.Code, §§ 1752, 1781). The Supreme Court in *Discover Bank* observed that the plaintiff in that case did not plead a cause of action under the CLRA and therefore did not invoke the statutory prohibition against a waiver of class actions (Civ.Code, § 1751). (*Discover Bank, supra*, 36 Cal.4th at p. 160.) In contrast, plaintiffs in the Marlowe action did plead a cause of action under the CLRA. The Marlowe complaint alleges that the termination fee provision is unconscionable and thereby violates the prohibition against insertion of unconscionable provisions in a contract (Civ.Code, § 1770, subd. (a)(19)). Nor do we have any need to examine the other claims of unconscionability raised on plaintiffs' cross-appeal.

Court of Appeal, First Appellate District, Division Five –
Nos. A106061/S106341/A106340
S138752

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PORSHA MEOLI, ET AL.,
Plaintiffs and Respondents,

v.

AT&T WIRELESS SERVICES INCORPORATED, ET AL.,
Defendants and Appellants.

Filed: December 14, 2005

Petition for review DENIED.

/S/ GEORGE
Chief Justice

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

IN RE: CELLPHONE TERMINATION
FEE CASES

J.C.C.P. 4332

Filed: January 20, 2004

ORDER DENYING MOTIONS OF AT&T AND
CINGULAR TO COMPEL ARBITRATION.

The motions of Defendants came on for hearing on December 11, 2002, in Department 22 of this Court, the Honorable Ronald M. Sabraw presiding. Counsel appeared on behalf of Plaintiffs and on behalf of Defendants. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED as follows: Motions of AT&T Wireless and Cingular to compel arbitration and stay proceedings are DENIED.

APPLICABILITY OF ARBITRATION PROVISIONS TO CLAIMS IN THE INTEREST OF THE GENERAL PUBLIC.

Certain plaintiffs are subscribers to AT&T Wireless and Cingular and are parties to the arbitration agreement.

Other plaintiffs are not subscribers to AT&T Wireless and Cingular (non-subscribers) and are not parties to the arbitration agreement. In determining whether the non-subscribers must submit to arbitration, the Court must address the issue expressly not addressed in *Cruz v. PacifiCareHealth Systems, Inc.* (2003) 30 Ca1.4th 303, 320 fn 7 – whether a plaintiff who is not a party to a contract and is bringing a UCL claim in the interest of the general public for claims arising from that contract is required to follow a dispute resolution mechanism required by the contract.

In determining whether the non-subscribers must submit to arbitration, the Court will consider the following four factors:

1. Whether the plaintiff is the government or a private plaintiff acting in the interest of the general public. *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 (EEOC not bound by arbitration clauses between employers and employees); *Cruz*, 30 Cal.4th at 319-320 n6 ("*Waffle House* suggests ... that a party acting *entirely* on behalf of the public ... acts beyond the scope of any arbitration agreement."); *Payne v. National Collection Systems, Inc.* (2001) 91 Cal. App. 4th 1037, 1045 ("An action brought pursuant to [the UCL] by a prosecutor is fundamentally different from a class action or other representative litigation.")

2. Whether the real party in interest is the general public as a whole or the injured members of the general public. Case law suggests that when a UCL claim is brought by a private plaintiff in the interest of the general public the claim might not be as "public" as a UCL claim brought by the government. *Cruz*, 30 Cal.4th at 316 and 318 (suggesting that monetary relief confers private benefits whereas injunctive relief is designed to prevent further harm to the public at large); *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649 (suggesting that a UCL claim by a private plaintiff can be brought on behalf of a class of injured members of the general public and not the public as a whole).

3. Whether the claim is a competitor or consumer claim. *Cruz*, 30 Cal.4th at 315 (addressing arbitration of consumer claims, but stating "We need not decide whether UCL injunctive relief actions brought by injured business competitors are arbitrable."); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tele-*

phone Co. (1999) 20 Cal. 4th 163, 187 n12 (definition of "unfairness" may depend on whether the subject matter of the litigation concerns the protection of competition among business entities or the protection of consumers from business entities).

4. Whether the relief at issue is monetary or injunctive. *Cruz*, 30 Cal.4th at 315-319 (private plaintiff is pursuing inarbitrable claims in the interest of the general public insofar as she seeks injunctive relief, but is pursuing arbitrable claims for her own benefit insofar as she seeks monetary relief).

These four factors are not found in the statute, but Courts of Appeal have indicated that the UCL should be applied differently depending on the identity of the plaintiff, the context of the claim, and the nature of the relief sought.

The Court reviews the arbitration clause in light of the above four factors.

(1) The non-subscribers are private plaintiffs acting in the interest of the general public. If the plaintiffs were a government body, then arbitration would not be required. *Waffle House, supra.* As suggested by the trial court in *Net2phone, Inc. v. Superior Court* (2003) 109 Cal. App. 4th 583, 587, it is unlikely that the real Attorney General would be bound by the arbitration agreements of private parties.

(2) The claims asserted by the non-subscribers are primarily in the interest of the injured members of the general public and not in the interest of the general public as a whole.

The Court first acknowledges that the Courts of Appeal have not clearly recognized a distinction between UCL claims in the interest of the general public as a whole and UCL claims on behalf of the injured members of the general

public. Where the plaintiff is a private person acting in the interest of the general public, the case law suggests that the real party in interest can be either (a) the general public as a whole or (b) the injured members of the general public. Where the real party in interest is the injured members of the general public, arbitration clauses can be enforceable. *Cruz*, 30 Cal.4th at 318 (representative UCL claims for monetary relief are primarily to obtain private benefits and therefore arbitrable).

The Court is reluctant to draw a bright line between UCL claims by government entities and UCL claims by private persons acting in the interest of the general public. Such a distinction is not supported by section 17204, which draws no distinction between governmental plaintiffs and private plaintiffs bringing claims on behalf of the general public. In other contexts the Court has made clear that the standards applicable to private plaintiffs also apply to government plaintiffs. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 214 (noting that the effect of heightened pleading standards "would not be limited to discouraging private suits; it would also seriously hamper suits by public officials seeking to enjoin schemes of unfair competition and deceptive advertising"). The Court is, however, required to draw a line between UCL claims by private plaintiffs that are in the public interest and UCL claims that advance private interests.

When a private plaintiff asserts a UCL claim in the interest of the general public the Court must engage in a case by case determination of whether the UCL claim is a "public" claim in the interest of the general public as a whole or a "private" claim in the interests of the injured members of the general public. In making the determination of whether a representative UCL claim serves a public or private purpose, the Court engages in an analysis similar to that for awarding fees for public interest litigation under C.C.P. 1021.5. See, e.g.,

Bradley v. Perrodin (2003) 106 Cal. App. 4th 1153, 1165 (the claimant's objective in the litigation must go beyond – 'transcend' – those things that concretely, specifically and significantly affect the litigant . . ., to affect the broader world or 'general public'); *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1170 (fees may not be awarded when the primary purpose of the lawsuit was the plaintiff's personal economic interest and the public interest was advanced coincidentally).

The Court holds that the injured members of the general public are the real parties in interest for the claims asserted in this case (unlawfulness of ETFs, locked handsets, and AT&T's deposit policy). The subject matter of the lawsuit concerns private contracts for cell phone service and only cell phone subscribers have suffered any direct injury. The general public as a whole may have suffered some injury because the ETFs and the sale of locked handset may have stifled the market in cell phone services and dissuaded some persons from getting cell phones, but the predominant injury alleged has been to cell phone subscribers.

The Court notes that the non-subscribers are not injured members of the general public, are not parties to the contracts at issue, and are not personally bound by the arbitration agreements. The non-subscribers' personal rights and remedies are not, however, at issue. The non-subscribers are bringing UCL claims in the interest of the allegedly injured members of the public, so the non-subscribers stand in the shoes of the injured persons and the UCL claim must be pursued as though brought by those injured persons.

(3) The UCL claim in this case is a consumer claim. Therefore, the *Cruz* analysis applies.

(4) The relief at issue in the motion for arbitration is monetary and injunctive. Under *Cruz*, claims for

monetary relief are subject to the arbitration clause whereas claims for injunctive relief are not.

The Court holds that the claims of the general public for injunctive relief do not have to proceed through arbitration. The Court holds that the claims for monetary relief by the general public are really in the interest of the injured members of the general public and that those claims must be submitted to arbitration if the arbitration agreement is enforceable against those injured persons.

ARBITRATION CLAUSE OVERVIEW

Insofar as the UCL and CLRA claims concern injunctive relief, in *Cruz v. Pacificare Health Systems, Inc.* (2003) 30 Cal.4th 303, and *Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066, the Court expressly held that such claims are not subject to arbitration.

Insofar as the claims concern monetary relief, Defendants AT&T and Cingular assert that the arbitration provision is enforceable under the Federal Arbitration Act and under California Law. Plaintiffs assert that the arbitration provision is unconscionable and cannot be enforced.

The unconscionability analysis is framed by *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83. Under *Armendariz*, unconscionability has a procedural and a substantive component. In order for a finding of unconscionability to be made, both components must be present. However, the two components operate on a sliding scale; the greater the procedural showing, the less is required from a substantive perspective, and vice versa. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, at 114. Procedural unconscionability is found when a contract provision is the result of "surprise" or "oppression". Surprise is present in a contract when the supposed agreed terms are hidden in a prolix agreement drafted by the party seeking to benefit from the disputed term. "Oppression" is

found when there is unequal bargaining power among the parties to the contract resulting in no real negotiation over the terms of the contract and no meaningful choice is available to the weaker party. "Substantive" unconcionability is found when a contract term is objectively excessive or unreasonable as in the case of excessive profits in relation to costs of goods or services. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, at 114; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3rd 473, at 489.

THE AT&T ARBITRATION CLAUSE IS NOT ENFORCEABLE.

As an initial procedural matter, before this coordinated proceeding commenced, the Court issued orders in *Meoli v. Viva Wireless*, Alameda County Case # RG03 – 086113, regarding the enforceability of the AT&T arbitration clause. Those orders dated July 1, 2003, and August 26, 2003, are VACATED and superceded by the orders in this coordinated proceeding.

The AT&T arbitration clause at issue is in the 2003 Wireless Service Agreement. (Haight Dec., Exh A.) The AT&T arbitration clause contains a waiver of the right to pursue a representative or class action. (Haight Dec., Exh A, para 28.) This clause is unconscionable under *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101. See also *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1175-1176 (applying California law and holding that a bar on class-wide arbitration is substantively unconscionable). The Court notes that the California Supreme Court may be addressing this issue in *Discover Bank v. Superior Court*, S113725. Under the present state of law, however, *Szetela* is controlling.

AT&T argues that the class waiver provision is an integral part of the agreement and cannot be severed. (AT&T Moving Papers at 9-12.) Therefore, the Court cannot sever the unconscionable clause and enforce the remainder of the

arbitration provision. As a result, the motion of AT&T to enforce the arbitration clause is DENIED because the arbitration clause is not enforceable.

The Court is aware that *Szetela's* holding regarding the enforceability of a waiver of the right to pursue a representative or class action is under review. If the California Supreme Court affirms *Szetela's* holding, then this order will remain unchanged. If, however, the California Supreme Court overrules *Szetela*, then the Court will invite a motion to reconsider this order. It would be a waste of resources to require Defendants to appeal from this order merely to preserve their rights.

By way of dicta, the Court observes that if the representative or class action waiver is enforceable, then plaintiffs will be precluded from pursuing UCL claims in the interest of the general public or class claims on behalf of similarly situated persons. Furthermore, they may be required to arbitrate their individual claims because the remainder of the arbitration clause appears to be enforceable.

Absent the representative and class action waiver, the AT&T arbitration clause does not appear to be substantively unconscionable. The clause is bilateral in its non-application to most billing disputes because it excludes claims by consumers that could be brought in small claims court and claims by Defendants for the collection of debts. (Haight Dec., Exh A, para 25.) Because most consumer billing disputes are within the jurisdiction of the small claims court, and it is doubtful that breach of an agreement for a telephone account would lead to consequential damages, personal injury damages, or emotional distress, virtually all disputes involving individual consumers could be resolved through the Courts. Therefore, the only claims that would be routinely subject to arbitration would be representative and class claims, which are expressly precluded.

For the few claims involving sums in excess of the small claims court jurisdiction that might proceed to arbitration, the fee-splitting arrangement does not appear to be unconscionable. (Haight Dec., Exh A, para 27.) For claims of less than $1,000, consumers have to pay only $25.00, which is equivalent to a small claims filing fee. For claims of between $1,000 and $75,000, consumers have to pay an amount equal to the equivalent court filing fee. Only for claims of over $75,000 do consumers split the cost of arbitration 50/50, and such claims are likely to be few and brought by commercial enterprises.

The arbitrator selection clause would favor AT&T if there were a large amount of arbitrations and AT&T could acquire familiarity with the panel. (Haight Dec., Exh A, para 26.) This potential problem is minimal because consumer claims can be resolved in small claims court.

The limitations period of two years does not appear to be unconscionable. (Haight Dec., Exh A, para 29.) Although longer than California's four year statue of limitations for breaches of written contracts, C.C.P. 337, it is the same length as California's statute of limitations for personal injuries and breaches of oral contracts, C.C.P. 335.1 and 339. Therefore, the California legislature does not consider two years to be unconscionably short.

The limitation on liability is not at issue in this motion. (Haight Dec., Exh A, para 31.) This section concerns the substantive rights of consumers under their agreements with AT&T and does not concern the question of whether a court or an arbitrator will be responsible for applying that section to the complaints of consumers.

The context in which the AT&T arbitration clause was presented to consumers has some indications of procedural unconscionablility, but these indications are not particularly strong. The clauses were not individually negotiated, but the

use of form contracts is not unusual or per se unconscionable. The existence of the clauses is noted on page 1 after a capitalized heading "ARBITRATION NOTICE," and the location of the clauses at paragraphs 25-29 must be considered in light of the fact that the Agreement contains a variety of terms and some must be up front and some must be later. The contract containing the clause is accepted by use of the phone, but the acceptance of a contract by using the product is not per se unconscionable.

Therefore, should the higher courts overrule *Szetela*, the Court will entertain a motion to reconsider this order and (based on the present record) would be likely to grant such a motion. The result of such an order would be that the claims against AT&T would not proceed in this Court on a class or representative basis and that the claims of the individual plaintiffs would be resolved in small claims court or in arbitration.

AT&T's motion to stay pending arbitration is DENIED. The motion to compel arbitration has been denied, so there is no basis to stay this action pending arbitration.

THE CINGULAR ARBITRATION CLAUSE IS NOT ENFORCEABLE.

There are three forms of the Cingular arbitration clause at issue: (1) the electronic version (Marlowe Complaint Exh D); (2) the written version (handed to Court at the hearing); and (3) the July 2003 billing insert version (Raglan Dec, Exh A). The Court has reviewed all three. Cingular has stated that any consumer who filed a claim could pursue arbitration under the terms of the July 2003 billing insert. (Cingular Moving Papers at 4:5-8.)

All three Cingular arbitration clauses contain a waiver of the right to pursue a representative or class action. These clauses are unconscionable under *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101. See also *Ingle v. Circuit*

City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1175-1176. As noted above, the California Supreme Court may be addressing whether to uphold or overrule the holding of *Szetela*. Under the present state of law, however, *Szetela* is controlling.

Cingular argues that the class waiver provisions are integral part of the agreements and cannot be severed. (Cingular Moving Papers at 12:27-28; Cingular Reply Papers at 7:21-22.) Therefore, the Court cannot sever the unconscionable clauses and enforce the remainder of the arbitration provisions. As a result, the motion of Cingular to enforce the arbitration clauses is DENIED because the arbitration clauses are not enforceable.

As noted above, the Court is aware that *Szetela's* holding is under review. If the higher courts overrule *Szetela*, then the Court will invite a motion to reconsider this order. It would be a waste of resources to require Defendants to appeal from this order merely to preserve their rights.

By way of dicta, the Court observes that if the representative or class action waivers are enforceable, then plaintiffs will be precluded from pursuing representative UCL claims or class claims and may be required to arbitrate their individual claims.

Absent the representative and class action waiver, the Cingular arbitration clause in the July 2003 billing insert does not appear to be substantively unconscionable. The clause is bilateral in its non-application to most billing disputes because it permits actions in small claims court. Because most consumer billing disputes are within the jurisdiction of the small claims court, and it is doubtful that breach of an agreement for a telephone account would lead to consequential damages, personal injury damages, or emotional distress, virtually all disputes involving individual consumers could be resolved through the Courts. Therefore, the

only claims that would be routinely subject to arbitration would be representative and class claims, which are expressly precluded.

For the few claims involving over sums in excess of the small claims court jurisdiction that might proceed to arbitration, the July 2003 billing insert states that "Cingular will pay all AAA filing, administration and arbitrator fees" unless the consumer's claim is improper or not warranted under the standards of F.R.C.P. 11 (frivolous motions and claims). This fee-splitting arrangement does not appear to be unconscionable. The July 2003 billing insert does not contain a confidentiality clause and permits the use of a large panel of arbitrators that would limit any "repeat player advantage" by Cingular.

The July 2003 billing insert does not appear to suffer from procedural unconscionablility. The Court is not aware of any law stating the changes to standardized consumer agreements are unconscionable because they arrive in billing inserts.

It is unclear whether the Court must consider the electronic version and written version of the arbitration clauses in light of Cingular's offer to resolve all arbitrations under the terms of the July 2003 billing insert. Cingular argues that the Court can simply substitute the terms of the July 2003 billing insert for the terms of the earlier versions. (Cingular Reply at 5:22-28.) Plaintiffs argue that if the earlier clauses were unconscionable, then the arbitration agreements are unenforceable. *Armendariz*, 24 Cal. 4th at 125 (a party cannot resuscitate a legally defective contract by offering to change it). The Court does not resolve this issue and does not share its thoughts on the electronic version and written version of the arbitration clauses.

Therefore, should the higher courts overrule *Szetela*, the Court will entertain a motion to reconsider this order and

(based on the present record) would be likely to grant such a motion insofar as it concerns the arbitration agreement in the July 2003 billing insert. The result of such an order would be that the claims against Cingular subject to the July 2003 billing insert would not proceed in this Court on a class or representative basis and that the claims of the individual plaintiffs would likely be resolved in small claims court or in arbitration.

Cingular's motion to stay pending arbitration is DENIED. The motion to compel arbitration has been denied, so there is no basis to stay this action pending arbitration.

DATED: JANUARY 20, 2004 */S/ RONALD M. SABRAW*
Judge of the Superior Court

Court of Appeal,
First District, Division 5, California.

PORSHA MEOLI, ET AL.,
Plaintiffs and Respondents,

v.

AT&T WIRELESS SERVICES, INC., ET AL.,
Defendants and Appellants.

Nos. A106061, A106340, A106341
(Alameda County Super. Ct. No JCCP 4332).

May 18, 2005.

As Modified on Denial of Rehearing
June 17, 2005.

Alan Roth Plutzik, Bramson, Plutzik, et al., Walnut Creek, CA, Reed Kathrein, Lerach Coughlin Stoia Geller Rudman & Robbins, San Francisco, CA, John David Franklin, Franklin & Franklin, William S. Lerach, San Diego, CA, for plaintiffs-respondents.

Joel S. Sanders, Gibson, Dunn & Crutcher, San Francisco, CA, Douglas R. Young, Farella, Braun & Martel, San Francisco, CA, for defendants-appellants.

Thomas Stephen Hixson, Bingham McCutchen LLP, San Francisco, CA, for Defendant.

Dennis E. Raglin, Drinker Biddle & Reath LLP, San Francisco, CA, for defendant-appellant Cingular Wireless LLC.

JONES, P.J.

In *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (*Szetela*), the Court of Appeal held an arbitration clause prohibiting class-wide arbitration to be unconscionable and unenforceable. The trial court in the present

case relied upon *Szetela* to rule that the arbitration clause at issue here is likewise unconscionable. Recognizing that the issue is pending before our Supreme Court, we will not follow *Szetela* and will conclude instead that under the facts in the present case the contractual ban on class-wide arbitration is not unduly one-sided, harsh, or in violation of public policy.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Three separate lawsuits were brought against defendant AT&T Wireless and other providers of wireless telephone service, challenging the "early termination fee" charged to customers who end their wireless telephone service before the expiration of the term of the service agreement.

First, Porsha Meoli and two other named plaintiffs brought a class action in Alameda County to challenge both the early termination fee and AT&T's locked handsets that preclude the use of competitors' networks. Plaintiffs alleged that the early termination fee constituted an unlawful liquidated damages provision and thereby violated the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et seq.) and the Consumers' Legal Remedies Act (CLRA) (Civ.Code, § 1750 et seq.). Second, Diane Tucker sued in Orange County under similar theories as a private attorney general under the UCL. And, in the third lawsuit, Jerilyn Marlowe and seven other named plaintiffs brought a class action in Alameda County alleging violations of the UCL and the CLRA. These three lawsuits were coordinated with other lawsuits pending against other wireless service providers.

Customers who purchase a mobile telephone for use on

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[1] The issue is pending before the California Supreme Court in *Discover Bank v. Superior Court*, review granted April 9, 2003 (S113725), and *Mandel v. Household Bank*, review granted April 9, 2003 (S113699).

the AT&T wireless system are subject to the terms and conditions of a wireless service agreement that comes with the phone. The customer has 30 days in which to review the terms and to cancel the agreement. Over the years, the exact language of the wireless service agreement has been altered, and there are three variations at issue in the lawsuits here.[2] All three versions contain an arbitration clause calling for the arbitration of all disputes arising out of the wireless service agreement. All three versions provide that the arbitration is to be governed by the wireless industry arbitration rules of the American Arbitration Association. Moreover, under all three versions the customer retains the right to bring an action in small claims court notwithstanding the agreement to arbitrate all disputes.

The arbitration clause allows only individual claims to be heard in arbitration. The early versions of the wireless service agreement provided that the arbitrator could not award relief on a class-wide or representative basis. The later version is even more explicit: "[A]ny arbitration will be conducted on an individual basis and not on a consolidated, class-wide, or representative basis."

The latest version of the arbitration agreement sets up a three-tiered system for allocation of costs. If the customer's claim is for less than $1,000, the customer must pay a fee of $25, and AT&T will pay the balance of administrative fees and costs. If the customer's claim is between $1,000 and $75,000, then the customer must share in the costs of arbitration, but need pay no more than the equivalent court filing

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[2] In 2001 and 2002, AT&T Wireless customers received a "welcome guide" with the telephone that contained the terms and conditions of the wireless service. The plaintiffs in the Meoli lawsuit received a welcome guide. Beginning in 2003, customers received a wireless service agreement. The plaintiffs in the Marlowe lawsuit received a wireless service agreement.

fee. And, if the claim is in excess of $75,000, then all administrative costs and expenses will be divided equally. The earlier versions had only a two-tiered system: $25 fee for claims under $1,000 and equal division of costs for claims above $1,000.

AT&T initially petitioned to compel arbitration in the Meoli lawsuit and, after the Marlowe and Tucker lawsuits were filed, petitioned in those cases as well. AT&T further requested that any arbitration conducted be limited to arbitration of individual claims. Plaintiffs opposed the petition, arguing that the arbitration clause was unconscionable in various particulars, including the ban on class-wide relief. The trial court rejected plaintiffs' other arguments on the unconscionability of the arbitration clause, but the trial court agreed that the ban on class-wide arbitration is unconscionable and invalid under the Court of Appeal decision in *Szetela, supra,* 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862. The court denied AT&T's petition to compel arbitration. By way of dictum, the court noted that because the arbitration clause is not otherwise unconscionable, if *Szetela* were not to be followed, arbitration would be compelled on an individual basis and not as a class or representative claim. AT&T filed its notice of appeal from the order denying arbitration.

Meanwhile, two additional lawsuits were filed against AT&T challenging the early termination fee—one by Alan Cherrigan on behalf of himself and the general public under the UCL and the second by Jael Salas. Those two lawsuits were added to the coordination proceeding, and by stipulation the order denying arbitration was applied to them. AT&T then filed notices of appeal on those cases. We consolidated the appeals pursuant to stipulation. Plaintiffs in the Meoli lawsuit as well as plaintiff Tucker have filed a protective cross-appeal to challenge the trial court's rejection of plaintiffs' other claims of unconscionability of the arbitration clause.

DISCUSSION

I. Injunctive Relief

All the plaintiffs seek, in addition to monetary recovery of the early termination fees, injunctive relief to benefit the general public. However, the California Supreme Court has held that such claims for injunctive relief are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316, 133 Cal.Rptr.2d 58, 66 P.3d 1157 [UCL]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079-1082, 90 Cal.Rptr.2d 334, 988 P.2d 67 [CLRA].) AT&T acknowledged below that the claims for injunctive relief were not arbitrable under *Cruz* and *Broughton*, and on appeal AT&T again recognizes that this court is bound to follow existing precedent from the California Supreme Court. We will, therefore, affirm the trial court's denial of AT&T's petition to compel arbitration of the claims for injunctive relief.

II. Monetary Claims

A. Nonsignatory Tucker

With one exception, plaintiffs subject to AT&T's petition to compel arbitration are parties to the arbitration clause in AT&T's wireless service agreement. The one exception is plaintiff Diane Tucker, who is not and never has been a subscriber to AT&T's wireless service. She brought suit against AT&T solely as a private attorney general under the UCL for the benefit of the general public.[3]

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[3] At the time of the proceedings below, section 17204 of the Business and Professions Code provided in relevant part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or any [authorized] county counsel ... or any [qualified] city attorney ... or by *any person acting for the in-*

Plaintiff Tucker is before us in another appeal on a lawsuit brought in San Mateo County against a different wireless telephone service provider. (*Tucker v. Cingular Wireless*, A106671 [challenging rates].) We apply the same reasoning here as in that related appeal and conclude that plaintiff Tucker cannot be compelled to arbitrate.

By statute, an order compelling arbitration is warranted when "an agreement to arbitrate the controversy exists" and "a party thereto refuses to arbitrate such controversy." (Code Civ. Proc., § 1281.2.) The fundamental assumption of arbitration is that the parties have consented to resolving their disputes outside the judicial process. The strong policy favoring arbitration as a means of resolving disputes does not extend to persons who are not parties to the arbitration agreement and have not elected to submit to arbitration. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245, 54 Cal.Rptr.2d 628; accord *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990, 112 Cal.Rptr.2d 358.) A proceeding to compel arbitration is essentially a suit in equity for specific performance of an arbitration agreement. A court in equity has no power to compel third party nonsignatories to arbitrate absent

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terests of itself, its members or *the general public*." (Bus. & Prof.Code, § 17204, italics added.)

While this appeal was pending, on November 2, 2004, the electorate amended the UCL by Proposition 64 to delete the provision for a private attorney general. (2004 West's Cal. Legis. Service, Prop. 64.) We find it unnecessary to examine the effect of Proposition 64 upon the present appeal.

Whether Diane Tucker is entitled to pursue her claims under the UCL is not an issue that is cognizable on AT&T's petition to compel arbitration. AT&T's assertions that Diana Tucker now lacks standing and that her claims should be entirely dismissed may be raised in the trial court by an appropriate motion.

some implied authority by the signatory to bind the nonsignatory. (47 Cal.App.4th at pp. 242-245, 54 Cal.Rptr.2d 628; see also *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89, 80 Cal.Rptr.2d 147.)[4]

As discussed at length in *County of Contra Costa v. Kaiser Foundation Health Plans, Inc., supra*, 47 Cal.App.4th at pages 242-245, 54 Cal.Rptr.2d 628, a nonsignatory has been held bound by an arbitration agreement in limited cases involving a preexisting relationship between the nonsignatory and a party to the agreement.[5] (E.g., *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702, 704, 709, 131 Cal.Rptr. 882, 552 P.2d 1178 [insured employee bound by arbitration clause in medical services contract entered into by employer]; *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1511, 26 Cal.Rptr.2d 725 [wife bound by arbitration clause in husband's physician-patient agreement]; *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222, 269 Cal.Rptr. 259 [general partner of the signatory limited partnership bound by arbitration clause in construction agree-

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[4] A nonsignatory third party may invoke an arbitration clause against a signatory based upon equitable estoppel. (E.g., *Alliance Title Co., Inc. v. Boucher* (2005) 127 Cal.App.4th 262, 25 Cal.Rptr.3d 440; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1 Cal.Rptr.3d 328.)

[5] Another theory for binding a nonsignatory is the doctrine of incorporation by reference. (E.g., *Slaught v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 748-749, 30 Cal.Rptr.2d 618 [arbitration clause in construction contract between property owner and general contractor incorporated into subcontracts]; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271-1274, 8 Cal.Rptr.2d 587 [arbitration clause in construction agreement incorporated into surety bond].)

ment].) Here, no preexisting relationship exists between plaintiff Tucker and the wireless telephone subscribers she purports to represent; there is no basis for finding that the wireless subscribers had authority to bind plaintiff Tucker to the arbitration agreement.

Net2Phone, Inc. v. Superior Court (2003) 109 Cal.App.4th 583, 135 Cal.Rptr.2d 149, upon which Cingular relies, is not on point. The question in that case was whether a forum selection clause could be enforced against a plaintiff who was not a party to the telephone service contract but who brought the action as a private attorney general under the UCL. We draw a distinction between a forum selection clause and an arbitration clause. A forum selection clause may be enforced against a nonparty who is "closely related to the contractual relationship." (*Id.* at pp. 587, 588, 135 Cal.Rptr.2d 149; *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1493, 14 Cal.Rptr.2d 906.) Enforcement of an arbitration clause, in contrast, requires more than the nonparty's connection to the contract. (E.g., *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 143, 119 Cal.Rptr.2d 489 [father's arbitration agreement with medical providers did not bind his adult daughters on their wrongful death claims]; *Benasra v. Marciano, supra*, 92 Cal.App.4th at p. 990, 112 Cal.Rptr.2d 358 [arbitration agreement signed by corporation's president not binding on the individual in his claim for libel]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1229, 249 Cal.Rptr. 544 [arbitration clause in contract between designer and third party not binding on property owner].)

Our Supreme Court has left unresolved the question whether a plaintiff seeking restitution as a private attorney general under the UCL can be compelled to arbitrate when the plaintiff is not a party to the arbitration agreement but is acting on behalf of injured consumers who are parties to the arbitration agreement. (*Cruz v. PacifiCare Health Systems,*

Inc., *supra*, 30 Cal.4th at p. 320, fn. 7, 133 Cal.Rptr.2d 58, 66 P.3d 1157.) We observe that the question has little practical significance, because the same factors that preclude a private attorney general from being compelled to arbitrate also serve to limit the plaintiff's relief in court. While civil penalties may be assessed when the action is initiated by a governmental prosecutor (Bus. & Prof.Code, § 17206), monetary damages are not recoverable under the UCL. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266, 10 Cal.Rptr.2d 538, 833 P.2d 545.) A private plaintiff is limited to injunctive relief or restitution, i.e., the return of money obtained through an unfair business practice (Bus. & Prof.Code, § 17203). And restitution requires an ownership or vested interest in the money; nonrestitutionary disgorgement of profits is not available to an individual acting as a private attorney general under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149-1152, 131 Cal.Rptr.2d 29, 63 P.3d 937.) As the Supreme Court explained, "The breadth of standing under this act allows any consumer to combat unfair competition by seeking an injunction against unfair business practices. *Actual direct victims of unfair competition may obtain restitution* as well." (*Id.* at p. 1152, 131 Cal.Rptr.2d 29, 63 P.3d 937; italics added.) In the present case, plaintiff Tucker is not an actual direct victim of AT&T's early termination fee and is acting only as a private attorney general. She has no monetary remedies under the UCL, even assuming arguendo that her claims remain viable. (See fn. 4, *ante*.) At most, her remedy is injunctive relief, and, as we have said, the claims for injunctive relief are not arbitrable.

B. The Ban on Class-wide Arbitration

(1) Unconscionability

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of

any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)[6] Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ.Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972, 64 Cal.Rptr.2d 843, 938 P.2d 903.)

The determination of unconscionability is a question of law for the court. (Civ.Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851, 113 Cal.Rptr.2d 376.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851, 113 Cal.Rptr.2d 376; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527, 60 Cal.Rptr.2d 138.)

It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ.Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075, 130 Cal.Rptr.2d 892, 63 P.3d 979.) Here, AT&T argued below and continues to assert that the provision is an integral part of the arbitration agreement and cannot be severed.

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The *procedural* ele-

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[6] The statutory reference to grounds for *revocation* of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to *rescind* the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973, 64 Cal.Rptr.2d 843, 938 P.2d 903.)

ment focuses on the way in which the disputed provision was presented – i.e., whether there was "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The *substantive* element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz v. Foundation Health Psychcare Services, Inc* (2000) 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (*Armendariz*); *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114.)

To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a "sliding scale" or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz*, *supra*, 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1056, 107 Cal.Rptr.2d 645.)

We agree with the trial court's conclusion that the arbitration agreement, included in the box along with the telephone, was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc.*, *supra*, 93 Cal.App.4th at p. 853, 113 Cal.Rptr.2d 376; *Stirlen v. Supercuts, Inc.*, *supra*, 51 Cal.App.4th at pp. 1533-1534, 60 Cal.Rptr.2d 138.) The more difficult question is whether the ban on class arbitration is substantively unconscionable.

That issue was addressed in *Szetela*, *supra*, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862. There the plaintiff

was a credit card holder who alleged that the bank (credit card company) had improperly charged him a $29 fee for exceeding his credit limit. The arbitration clause in the credit card agreement prohibited joining or consolidating claims in arbitration or arbitrating claims as a representative, as a member of a class, or as a private attorney general. When the plaintiff brought a class action, the bank successfully moved to compel arbitration on an individual basis. The appellate court held the ban on class treatment to be unconscionable, and the court directed the trial court to proceed to arbitration on a class basis.

The *Szetela* court reasoned that the ban on class arbitration was unfairly one-sided: "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly meant to prevent customers ... from seeking redress for relatively small amounts of money, such as the $29 sought by Szetela. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights." (*Szetela*, *supra*, 97 Cal.App.4th at p. 1101, 118 Cal.Rptr.2d 862.)

The lack of mutuality is, of course, a basis for finding substantive unconscionability. (*Armendariz*, *supra*, 24 Cal.4th at pp. 117-121, 99 Cal.Rptr.2d 745, 6 P.3d 669.) The courts have found unconscionable a clause requiring arbitration for the weaker party while giving the stronger party a choice of forum. (*Id.* at pp. 120-121, 99 Cal.Rptr.2d 745, 6 P.3d 669 [only employee's claims of wrongful termination subject to arbitration]; *Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th at p. 1073, 130 Cal.Rptr.2d 892, 63 P.3d 979 [allow-

ing appeal of any award over $50,000 effectively gave only employer right to appeal]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407-1408, 7 Cal.Rptr.3d 418 [personal injury damages not available without contractor's consent]; *Flores v. Transamerica HomeFirst, Inc., supra*, 93 Cal.App.4th at p. 855, 113 Cal.Rptr.2d 376 [only borrower's claims subject to arbitration while lender had remedy of foreclosure].)[7]

In the present case, the ban on class-wide arbitration does tend to favor AT&T. The obvious effect is to limit the scope of potential damages that AT&T would face in class arbitration without the ability to obtain judicial review. Yet, the ban on class arbitration does not affect the choice of forum. Class actions through *litigation* are necessarily precluded by the agreement to arbitrate. The limitation is only on the breadth of the arbitration proceeding – i.e., the *manner* in which the arbitration is to occur. And the limitation in the present case is materially different from the clause in *Szetela*. The arbitration clause here expressly permits the customers to obtain relief in small claims court.[8] Moreover, the cost to the customer is limited to $25 on claims under $1,000; AT&T will pay all other administrative costs and fees. In contrast to the

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[7] Not every instance of one-sidedness is invalid: "[A] contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." (*Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at p. 1536, 60 Cal.Rptr.2d 138; accord, *Armendariz, supra*, 24 Cal.4th at p. 117, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

[8] Oddly, the *Szetela* court seems to have presumed that the credit cardholders were free to go to small claims court but would be unlikely to do so. Yet, the arbitration clause in that case withdrew the right to litigate any claim in court. (*Szetela, supra*, 97 Cal.App.4th at p. 1096, 118 Cal.Rptr.2d 862.)

credit card customers in *Szetela*, AT&T's subscribers are not deterred from seeking redress for small amounts. Under these circumstances, we do not find the arbitration clause so one-sided or unreasonable to be substantively unconscionable.

(2) Impairment of Statutory Rights

The Supreme Court has recognized two distinct defenses to a motion to compel arbitration: (1) the arbitration agreement is unconscionable, and (2) arbitration would compel the claimant to forfeit certain statutory rights. (*Armendariz, supra*, 24 Cal.4th at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 86, 7 Cal.Rptr.3d 267.) The parties here have not made a distinction between the two defenses but have treated the latter as a version of unconscionability. We treat the two defenses separately.

It is now well settled that even claims arising under a statute designed to further important social policies may be arbitrated. (*Green Tree Fin. Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373; *Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th at p. 317, 133 Cal.Rptr.2d 58, 66 P.3d 1157 [UCL]; *Broughton v. Cigna Healthplans*, *supra*, 21 Cal.4th at p. 1084, 90 Cal.Rptr.2d 334, 988 P.2d 67 [CLRA].) But arbitration will be denied if the prospective litigant is precluded from fully vindicating the statutory cause of action in the arbitral forum. (531 U.S. at p. 90, *Armendariz*, *supra*, 24 Cal.4th at pp. 99-104, 99 Cal.Rptr.2d 745, 6 P.3d 669.) In *Armendariz*, the claimant/employees sued for sexual harassment under FEHA, but the arbitration clause in their employment contract confined the potential relief to back pay and precluded recovery of punitive damages and attorney fees – recovery that would otherwise have been available under FEHA. The Supreme Court held that the limitation on remedies was unlawful as it would prevent the employees' full vindication of their rights under FEHA. (See also *Stirlen v. Supercuts, Inc.*, *supra*, 51

Cal.App.4th at pp. 1539-1540, 60 Cal.Rptr.2d 138 [limit on remedies under several statutes]; *Graham Oil v. ARCO Products Co.* (9th Cir.1994) 43 F.3d 1244, 1248 [limit on remedies that would be available under Petroleum Marketing Practices Act].)

Plaintiffs apparently rely upon this principle in emphasizing that consumer class actions are given statutory protection. Under the CLRA, class actions are specifically permitted (Civ.Code, §§ 1752, 1781), and any purported contractual waiver of rights granted by the CLRA is invalid (Civ.Code, § 1751). Also, at the time of the events here, the UCL allowed consumers to redress unfair business practices through private attorney general actions. (Bus. & Prof.Code, § 17204; see fn. 4, *ante*.)

The *Szetela* court apparently relied upon this principle, too, in finding that the contractual ban on class arbitration violates public policy. The *Szetela* court reasoned that the ban would undermine consumer protection statutes by eliminating the private attorney general mechanism: "[The clause] contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof.Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover [Bank's] business practices. This is not only substantively unconscionable, it violates public policy by granting Discover [Bank] a 'get out of jail free' card while compromising important consumer rights." (*Szetela*, *supra*, 97 Cal.App.4th at p. 1101, 118 Cal.Rptr.2d 862.)

We cannot agree that the ban on class arbitration immunizes businesses from consumer protection lawsuits. The arbitration clause has no effect on actions by the Attorney

General or other governmental prosecutors to redress unfair business practices. (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755; see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32, 111 S.Ct. 1647, 114 L.Ed.2d 26.) Nor does the ban on class arbitration do anything to limit litigation. The customer's right to litigate has already been curtailed by the arbitration agreement itself. As we have said, monetary claims under the UCL and CLRA are arbitrable even though such claims vindicate important statutory rights. What is restricted here is the breadth or manner of arbitration and the ability to pursue the claims of others within the arbitration.

There is no statutory right to class arbitration. Class arbitration has been held *permissible* when the trial court, in the exercise of its discretion, finds that the interests of justice require class-wide relief. (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 609-614, 183 Cal.Rptr. 360, 645 P.2d 1192, reversed on other grounds *sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1; *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 64, 78 Cal.Rptr.2d 779; see *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414; *Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th at pp. 318-319, 133 Cal.Rptr.2d 58, 66 P.3d 1157.) However, judicial recognition of a class-wide remedy in arbitration cannot be equated with a nonwaivable statutory right. Indeed, a nonwaivable right to class arbitration would undermine the purpose of arbitration. Arbitration is meant to resolve *private* disputes in an expeditious and efficient manner, not to remedy a public wrong. (*Broughton v. Cigna Healthplans*, *supra*, 21 Cal.4th at p. 1080, 90 Cal.Rptr.2d 334, 988 P.2d 67.) The fact that the procedural device of class treatment is not available in arbitration is "part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [citing *Gilmer v. Interstate/Johnson Lane*

Corp., supra, 500 U.S. at p. 31], characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." (*Iberia Credit Bureau, Inc. v. Cingular Wireless* (5th Cir.2004) 379 F.3d 159, 174.)

C. Other Claims of Unconscionability

The cross-appeal by plaintiffs requires that we examine the other claims of unconscionability to determine whether the trial court's order denying arbitration may be affirmed on some other ground. We conclude that the arbitration clause is not substantively unconscionable in any respect.

(1) Mutuality

The early versions of the arbitration clause provided in pertinent part as follows: "Binding Arbitration. This provision is intended to be interpreted broadly to encompass all disputes or claims arising out of our relationship. Any dispute or claim made *by you against us* ... arising out of or relating to this Agreement ... (whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory) will be resolved by binding arbitration except that (1) you may take claims to small claims court if they qualify for hearing by such a court, or (2) you or we may choose to pursue claims in court if the claims relate solely to the collection of any debts you owe to us." (Italics added.)[9]

Plaintiffs focus on the phrase "any dispute or claim made *by you against us*" to assert that the arbitration clause requires only the customer to arbitrate disputes, leaving AT&T free to bring its claims to court. From this reading of the arbitration clause, plaintiffs contend the arbitration clause lacks mutuality.

We cannot agree with plaintiffs' interpretation of the ar-

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[9] The later version omits the italicized phrase.

bitration clause. The phrase in question seems to be in the nature of an alert to the customer that the customer's claims will be arbitrated; it does not exclude AT&T's own claims from arbitration. Indeed, other language in the arbitration clause indicates that AT&T's claims, too, will be arbitrated. The exception for debt collection states that "you *or we* may choose to pursue [debt collection] claims in court...." (Italics added.) The words "or we" would be unnecessary if all of AT&T's claims could be litigated. Moreover, language later in the clause states: "By this agreement, both you and we are waiving certain rights to litigate disputes in court." This language confirms that the obligation to arbitrate is mutual.

(2) Cost Sharing

Plaintiffs argue that the early two-tiered and later three-tiered arrangements for allocation of costs are unconscionable, because the customer faces the possibility of substantial fees. We cannot agree.

First, we reject plaintiffs' implicit assertion that consumers cannot be required to pay *any* costs of arbitration. Plaintiffs rely on *Armendariz, supra,* 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, in which the Supreme Court held that when an employer imposes mandatory arbitration as a condition of employment, the employee cannot be required to bear any type of expense that is unique to arbitration and that the employee would not have to bear, were he free to bring his case to court. (*Id.* at pp. 107-113, 99 Cal.Rptr.2d 745, 6 P.3d 669.) Accordingly, the court interpreted the contract that was otherwise silent on the issue to mean that the employer must bear all costs of arbitration. (*Id.* at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

That "categorical" approach differs from the approach taken by the United States Supreme Court in a consumer arbitration case, *Green Tree Fin. Corp.-Ala. v. Randolph, supra,* 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373. In the face

of a silent agreement, the court held that a party could seek to invalidate an arbitration agreement on the ground that the costs of arbitration would be "prohibitively expensive," but the consumer in that case failed to prove the likelihood that the costs would be so. (531 U.S. at pp. 90, 92.) Subsequent decisions have characterized the *Green Tree* approach as necessitating a case-by-case analysis. (*Gutierrez v. Autowest, Inc., supra,* 114 Cal.App.4th at p. 96, 7 Cal.Rptr.3d 267.)[10]

The California Supreme Court has not yet ruled on the allocation of costs in a consumer arbitration, but we have concluded that the case-by-case approach should be used in consumer cases. (*Gutierrez v. Autowest, Inc., supra,* 114 Cal.App.4th at pp. 96-98, 7 Cal.Rptr.3d 267.) In *Guitierrez,* the claimant established an inability to pay the up-front administrative fees, and we held the fee division provision unconscionable where the arbitration agreement provided no avenue for relief from unaffordable fees. (*Id.* at pp. 89-92, 7 Cal.Rptr.3d 267.) The present case is markedly different. Plaintiffs here have made no showing that the costs of arbitration would be prohibitively expensive. In fact, the arbitration clause limits a customer's total costs to $25 on a claim under $1,000, and the trial court found that $25 is equivalent to the filing fee in small claims court. Only on claims in excess of $75,000 (or $1,000 under the earlier version) is there a chance that the customer will be ordered to pay costs of arbitration above what the customer would pay to bring a lawsuit. Yet, because we have concluded that the arbitration must proceed on an individual basis, there is no discernible possibility that any of the plaintiffs would have a claim for

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[10] In *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at pages 1081-1085, 130 Cal.Rptr.2d 892, 63 P.3d 979, the California Supreme Court recognized the difference in the two approaches and affirmed its categorical approach in mandatory employment arbitration.

recovery of an early termination fee in such large amounts. In any event, in a *consumer* arbitration proceeding, a consumer who can establish indigency is entitled to a waiver of all costs. (Code Civ. Proc., § 1284.3, subd. (b).) We find nothing overly harsh or unfair in the provision relating to costs in arbitration.

(3) Confidentiality

The early version of the arbitration clause contained a provision requiring the parties to keep confidential the outcome of any arbitration proceeding. That confidentiality provision was entirely omitted from the later version in 2003. Even assuming arguendo that the confidentiality provision is unconscionable, we agree with AT & T that the provision is readily severable from the remainder of the arbitration agreement.

The trial court has authority to sever an unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ.Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at pp. 1074-1075, 130 Cal.Rptr.2d 892, 63 P.3d 979.) "If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Armendariz, supra,* 24 Cal.4th at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.) Here, the confidentiality provision is a single, discrete provision that is not integral to the arbitration agreement. The offending provision can be stricken without affecting the rest of the arbitration agreement.

(4) Limitations Period

The later version of the arbitration agreement contains a provision that imposes a two-year limitation period on claims against AT&T, whether brought in court or in the arbitral fo-

rum. Plaintiffs contend that because this two-year limitations period shortens the three-year-period under the CLRA (Civ.Code, § 1783) and the four-year period under the UCL (Bus. & Prof.Code, § 17208), the provision is unconscionable.

The contractual provision shortening the limitation period was not placed in the wireless service agreement until 2003, and all of the lawsuits filed here were timely under the two-year limit. There is no justiciable controversy here.

In any event, the provision is not unconscionable. Parties may agree by contract to shorten the limitations period otherwise provided by the statute of limitations as long as the shortened period is itself reasonable. (*Beeson v. Schloss* (1920) 183 Cal. 618, 622, 192 P. 292; *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc.* (1995) 38 Cal.App.4th 1532, 1548, 46 Cal.Rptr.2d 33; *West v. Henderson* (1991) 227 Cal.App.3d 1578, 1585, 1588, 278 Cal.Rptr. 570.) Plaintiffs rely on *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at page 1542, 60 Cal.Rptr.2d 138, that held a one-year limitation period in an employment agreement, when taken with other unilateral restrictions on the employee's remedies, to be unconscionable. The limitation period here, of course, is two years, not one, and we have not found any other provision to be unduly harsh. Plaintiffs have made no showing that the two-year limit unreasonably forecloses relief.

(5) Neutral Arbitrator

Plaintiffs contend that because the arbitration is governed by the wireless industry arbitration rules there is a risk that the arbitrator will not be neutral. This lack of neutrality assertedly comes from the fact that the wireless industry arbitration rules call for selection of an arbitrator from a limited panel of telecommunications specialists. Plaintiffs reason that AT&T will have the benefit of being a "repeat player" in

front of the telecommunications panel, gaining knowledge of individual arbitrators' style, preferences, and methods.

The trial court acknowledged the risk but found only minimal potential for harm to the customers because the customers retain the ability to go to small claims court. We agree. In any event, plaintiffs acknowledge that the method for selecting the arbitrator is not itself substantively unconscionable; plaintiffs contend only that it is unconscionable when accompanied by the other unconscionable provisions. We do not find any other provision unconscionable.

DISPOSITION

The order denying the petition to compel arbitration is affirmed as to plaintiff Diane Tucker. As to the remaining plaintiffs, the order is reversed in part, and the trial court is directed to enter a new order compelling arbitration of the monetary claims on an individual basis. With respect to the claims for injunctive relief, the order denying arbitration is affirmed. The parties shall bear their own costs on appeal.

We concur: STEVENS and SIMONS, JJ.

Court of Appeal, First Appellate District, Division 5
Nos. A106061/A106340/A106341
S134845

IN THE SUPREME COURT OF CALIFORNIA
En Banc

PORSHA MEOLI, ET AL.,

Plaintiffs and Respondents,

v.

AT&T WIRELESS SERVICES, ET AL.,

Defendants and Appellants.

Aug. 24, 2005.

Petitions for review GRANTED.

The matter is transferred to the court of Appeal, First Appellate District, Division Five, with directions to vacate its decision and to reconsider the matter in light of *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.

/s/ GEORGE
Chief Justice

/s/ KENNARD
Associate Justice

/s/ BAXTER
Associate Justice

/s/ WERDEGAR
Associate Justice

/S/ CHIN
Associate Justice

/S/ MORENO
Associate Justice